# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

CHILDREN'S SERVICES INTERNATIONAL, INC.

and Case 32-CA-21495-1

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 817, AFL-CIO

Amy L. Berbower, Esq., of Oakland, California, for the General Counsel.

Antonio Ruiz, Esq., (Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

Robert J. Wilger, Esq., Adam J. Fiss, Esq. (Littler Mendelson) San Jose, California, for Respondent.

#### **DECISION**

#### Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Oakland, California, on January 11 through January 14, 2005. On July 9, 2004, Service Employees International Union, Local 817, AFL-CIO, (the Union) filed the original charge alleging that Children's Services International, Inc., (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). The Union filed the first amended charge on August 11, 2004. On September 28, 2004, the Union filed its second amended charge. On October 28, 2004, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(1), and (3) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses<sup>1</sup> and having considered the post-hearing briefs of the parties, I make the following:

# Findings of Fact and Conclusions

#### Jurisdiction

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The Employer is a California non-profit corporation with facilities in Gonzalez, Greenfield, Marina, Salinas and Pajaro, California, engaged in providing childcare and educational services. During the 12 months prior to issuance of the complaint, the Employer, in the course and conduct of its business, received gross revenues in excess of \$250,000 and directly received revenues in excess of \$100,000 from outside the State of California. Accordingly, Respondent admits and I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent admits and I find that at all times material herein Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

# II. The Alleged Unfair Labor Practices

#### A. The Facts

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# 1. Background and Issues

Respondent and the Union are parties to a collective-bargaining agreement, effective by its terms from October 1, 2002 to September 30, 2004. The agreement covers two units of the Employer's employees; the Center Base Unit and the Administrative Unit. The agreement includes a union-security clause requiring unit employees, after a lawful grace period, to become and remain members of the Union.

On November 14, 2003, a child care center-based employee filed a petition in Case 32-UD-207 seeking to withdraw the authority of Respondent and the Union to enforce the union-security clause. On April 1, 2004, an election was held under the supervision of the Regional Director of Region 32. On April 12, 2004, the Regional Director issued a certification of results of election certifying that a majority of the eligible employees did not vote to withdraw the authority of the Union and Employer to enforce the lawful union-security clause. On May 28, 2004, I issued a decision in Case 32-CB-5713-1 finding that the Union had violated Section 8(b)(1)(A) of the Act by announcing and making monetary payments to employees in order to restrain and coerce employees during the pendency of a deauthorization petition in Case 32-UD-207. In the absence of exceptions, the Board adopted my decision.

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<sup>&</sup>lt;sup>1</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

On June 30, 2004, Respondent, faced with budget cuts, merged two of its administrative departments, its provider contracts department and its provider payout department, and laid off three employees. Although the General Counsel does not contest Respondent's decision to merge departments or to layoff employees, General Counsel alleges that Respondent selected senior and experienced employees, Aurora Urzua and Griselda Palafox, for layoff because of their Union and/or protected concerted activities. General Counsel contends that Respondent selected Palafox and Urzua for layoff by "evaluating" their qualifications under such artificially limited criteria that it was clearly predetermined that Urzua and Palafox would be laid off. Moreover, General Counsel the evidence shows that the work that they performed for 23 and 6 years respectively was assigned to less senior and untrained employees following the layoff. Respondent contends that it choose these employees for lay off based on qualifications.

#### 2. The Administrative Unit

The "Administrative Unit", the unit at issue herein, encompasses four departments: the 15 provider contracts department, the eligibility department, the provider payout department and the finance department.<sup>2</sup> The provider contract department employed three provider contract specialist (PCS) employees, Aurora Urzua, Griselda Palafox, and Roxanne Segobia. These PCS employees were responsible for registering independent childcare providers into Respondent's alternative payment program and negotiating contracts under which the providers 20 would be reimbursed for the care of children in eligible families. The payout department employed approximately seven payout specialist employees who were responsible for calculating and processing monthly payments to the independent childcare providers. The eligibility department employed approximately ten eligibility specialists who were responsible for enrolling low-income families eligible for subsidized childcare into Respondent's program. The 25 finance department includes a financial and information systems specialist and an accounts receivable specialist. The unit also includes one receptionist. Prior to the June 30, layoffs at issue herein, Sylvia Alderete supervised the PCS and eligibility employees and Pat Diaz supervised the payout employees.

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The PCS employees were responsible for enrolling new providers to the alternative payment program. They also maintained the provider files for Respondent's more than 600 different providers enrolled in the program, including licensed day care providers, exempt providers, private center programs, schools and churches. PCS employees executed contracts with the providers on behalf of Respondent and established separate rate sheets for each provider, which included different rates according to a child's age, special needs, premiums for after hours and weekend care, and a parent contribution schedule, in certain circumstances. When executing provider contracts, PCS employees were responsible for explaining to the providers all the rules, regulations and procedures (maintained by Respondent and the State of California) that apply to the alternative provider program, and must obtain the mandated documentation for the provider files.<sup>3</sup> PCS employees also explained Respondent's payment

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 <sup>&</sup>lt;sup>2</sup> As mentioned earlier, Respondent operates various childcare centers. The employees at those childcare centers are represented by the Union in a separate unit. There are approximately 100 employees in the center-based unit.
 <sup>3</sup> The State regulations regarding payment for the independent childcare providers often

<sup>&</sup>lt;sup>3</sup> The State regulations regarding payment for the independent childcare providers often changed. When there were changes in the State regulations, Respondent's alternative provider program employees were required to make changes accordingly. Urzua and the supervisors attended training sessions in order to learn about the changes in the State regulations. Urzua and the supervisors would in turn advise the employees in the provider contracts and payout departments about these changes.

process and instructed providers how to fill out and calculate timesheets for reimbursement. PCS employees assisted providers after the initial enrollment by executing new contracts when rates changed, updated provider information, verified provider income to outside agencies, and responded to provider inquiries about rates, regulations and payment problems.

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Prior to the instant layoffs, Respondent's payout department processed the provider payments for care provided to eligible families under the alternative provider program. Each month, the payout employees mailed blank timesheets to the providers. The providers completed the time sheets and submitted them for payment during the first three days of each month. The payout employees reviewed the completed timesheets, verified the rates claimed by the provider, manually calculated payment due using a ten key calculator and attached the ten key tape to the timesheet to verify the calculation for auditing purposes. The calculated amounts were then entered into Respondent's NOHO software program.<sup>4</sup> The calculated and verified timesheets were forwarded to the financial department, which prints the providers' checks that due the 15<sup>th</sup> of each month. After payment is mailed out each month, payout employees process late timecards and complete an in-house report, which is used to doublecheck the payment calculations. The PCS employees routinely assisted payout employees during the processing of provider payout to determine rates and calculate provider payment. PCS employees also regularly assisted payout processing of payment to rectify over and under payments reported by providers. Prior to the layoffs, the PCS employees kept the provider contracts and files. This required the payout employees to go to the PCS offices to check provider contracts and files. This process was not efficient and was improved by the merger of the two departments at the end of June 2004.

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At the time of the June 30 layoffs, Urzua was Respondent's most senior employee and had been working in the alternative provider program for over 23 years. Prior to 1999, Urzua supervised all facets of the alternative provider program. In 1999, Timothy O'Connell, then Respondent's executive director, divided the program into the provider contracts, payout and eligibility departments. Prior to this change Urzua was responsible for all aspects of the alternative provider program including enrolling providers, enrolling eligible families and processing payouts to providers. After the change in 1999, Urzua continued to supervise the senior provider contract employees until Diaz was promoted to supervise the department. During her employment with Respondent, Urzua trained many alternative provider program employees, including current supervisors Diaz and Alderete, and both PCS employees Palafox and Roxanne Segobia.

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Palafox worked for Respondent as a PCS employee since March 1999. She was the fourth most senior employee in the administrative unit. Palafox' last appraisal praised her knowledge of work procedure and regulations and the quality and quantity of her work. Palafox was senior to Segobia, the third PCS employee.

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Segobia began working for Respondent in September 2001 as a payout specialist. In March 2003, Segobia became a provider contract specialist. After the layoffs of June 30, Segobia worked in the payout department performing provider contract and payout work.

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Urzua, Palafox and Segobia were all known Union activists. Urzua was one of four employees on the Union's initial organizing committee. Palafox served as a Union observer

<sup>&</sup>lt;sup>4</sup> Respondent intends to utilize the NOHO software program to calculate payouts to providers. However, at the times relevant herein, Respondent's employees were still calculating the payouts with a ten key calculator.

during the representation election in 2002. Both Urzua and Palafox were members of the Union's negotiation committee and represented the administrative employees in negotiations for the collective bargaining agreement. Urzua and Palafox were among the Union representatives who executed the bargaining agreement on behalf of the Union.

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After the bargaining agreement became effective, Urzua and Palafox negotiated with Respondent's management concerning various issues. Both employees also brought issues before the public meetings of Respondent's Board of Directors.

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In March 2004, Segobia became the Union's shop steward for the administrative unit. Even after Segobia became steward, Urzua and Palafox continued to assist employees with personnel and contract issues. Urzua attended two meetings with management in June 2004, to discuss Respondent's budgetary problems. During a meeting on June 8, 2004, Urzua questioned Ruben Guajardo, Respondent's Human Resources Manager, regarding the allocation of 80% of his salary to the administrative unit. Urzua pointed out that the center-based unit had approximately 100 employees and the administrative unit had only 23 employees. Guajardo replied that there were "problems" in the administrative unit and that unit was more "difficult".

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# 3. Jean Miner's Meeting with the Administrative Unit

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After the filing of the deauthorization petition on November 14, 2003, the Union campaigned heavily to defeat the petition. The Union's campaign included at least one flyer, which was extremely critical of Jean Miner, Respondent's founder, and then interim director of center based programs.

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On April 14, Jean Miner held a meeting with Respondent's administrative employees to address her concerns with a Union flyer. The flyer complained that Respondent had not granted the center-based employees an expected \$.25 per hour wage increase. The flyer contained a picture of Miner's car and home and contended that Respondent could have paid the employees the raise but for Miner's alleged greed.

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Although Respondent claims that Miner had no authority over the administrative employees, she required all administrative employees to attend the meeting during work time.<sup>5</sup> Palafox was busy with a client and Miner delayed the meeting until Palafox could attend. Miner started the meeting by stating that it would be a brief meeting because only she would be speaking. Miner passed out the Union flyer stating that the flyer was what the employees were paying the Union for. When Miner attempted to give Palafox a copy of the flyer, Palafox said that she had already seen it. Miner replied "of course you did because you created it." Palafox answered that she had not and that Miner should talk to the Union. Miner then responded," You pay the Union."

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Miner told the employees that she had gone through their personnel files and that the employees were uneducated. Miner said the employees had the best jobs that they ever had and were lucky to have their jobs. Segobia asked Miner if the meeting was related to her work and if she could be excused. Miner told Segobia that she could be excused. As Segobia left the meeting, Urzua and Palafox went with her. As the three employees were leaving, Miner

<sup>&</sup>lt;sup>5</sup> Although the deauthorization petition and campaign concerned the center-based unit, Miner did not hold any meetings with the center-based employees to complain about the Union's flyer.

declared, "There go your leaders." Miner also said, "I'll see you tomorrow at the rally." Miner then explained to the employees that her car and house were already paid for and that she was volunteering for Respondent until a permanent director could be found. Miner was visibly shaken and an employee questioned her about it. Miner answered that she just "needed to hit something." <sup>7</sup>

This was not the first time that Miner expressed extreme animus against the Union and its adherents. In 2002, Miner distributed a letter in which she referred to union supporters as a gang driven by mob menality. She accused them of "alcoholism, domestic violence, limited education, social isolation, emotional disability, and a value system that does not recognize the boundaries of law nor the rights of others." She stated inter alia, "It is most unfornuate that the self-serving (more highly compensated but disgruntled office workers) have derailed the organization [Respondent) and will deprive many of the benefits it offered." Urzua was Respondent's most senior and highest paid office worker at that time. It is clear that Urzua was included among the employees that Miner was accusing of "creating chaos." At the hearing, Miner reaffirmed the views expressed in her 2002 letter.

On April 15, the day after Miner's meeting with the administrative unit employees, employee Leticia Caldera filed a grievance complaining about Miner's intimidating and threatening behavior. Seventeen employees, including Urzua, Palafox and Segobia, signed the grievance. On April 26, Timothy O'Connell<sup>8</sup>, then Respondent's executive director, responded that no apology would be forthcoming and that Miner would leave Respondent's employ at the end of April.<sup>9</sup> Twelve employees, including Palafox, responded in writing that O'Connell's answer was not adequate.

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On Thursday, April 15, Urzua and Palafox participated in a Union rally after work in which providers and employees rallied to protest what they perceived as Respondent's inconsistent application of provider rates and the failure of Respondent to grant wage increases to the center-based employees. The next day, a local newspaper carried a story about the rally and published a picture that showed Palafox carrying a picket sign stating "Management Must Resign Now." Urzua's husband was also shown in the newspaper photograph holding a sign, which read "Jean Miner The Intimidator Must Go." A local television station also videotaped the rally. The videotape, which was aired often on local public television, included an interview with Palafox in which she criticized Respondent and Jean Miner.

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# 4. The Layoffs of Urzua and Palafox

On May 5, O'Connell and Guajardo met with Union organizer Sergio Sanchez and Segobia to discuss Respondent's anticipated budget shortfall. During the meeting, Guajardo notified the Union of Respondent's expected budgetary shortfall and asked the Union to "start thinking" about cost reductions in the administrative unit. At this meeting, there was no discussion of layoffs.

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<sup>&</sup>lt;sup>6</sup> The Union had planned a rally at Respondent's offices to be held the next day.

<sup>&</sup>lt;sup>7</sup> Miner said that she facetiously stated that she needed to hit something. She explained that at the childcare centers, children are told they can release their frustrations by hitting an inanimate object.

<sup>&</sup>lt;sup>8</sup> O'Connell is Miner's son-in-law.

<sup>&</sup>lt;sup>9</sup> Miner's contract as interim director of the centers was extended until August 30.

Thereafter, O'Connell and Guajardo began considering plans to cut \$130,000 from the administrative budget. They focused on merging the provider contract department and the payout department with the resultant layoff of three employees. The merger of these two departments seemed logical because they had previously been combined. In fact, Urzua had suggested such a merger in a Union-Respondent meeting. According to Guajardo he spoke with supervisors Alderete and Diaz, the supervisors of the two departments involved. The supervisors were in favor of such a merger because both departments dealt with providers, used the same provider information and the merger would reduce the ratio of providers to employees. While there was some discussion concerning the experience of the PCS employees, there was no discussion of the qualifications of the payout employees. The supervisors were not questioned as to the abilities of the employees in their departments or whom they would choose for layoff.<sup>10</sup>

Following his meeting with supervisors Alderete and Diaz, Guajardo met with O'Connell to finalize the decision to merge the provider contract and payout departments. Guarjado and O'Connell agreed that the merger of these two departments was a logical cost saving strategy because the PCS and payout employees both worked with the independent childcare providers and the departments had previously been incorporated in a single department. On or about May 24, O'Connell directed Guajardo to draft a memorandum setting forth the plan to merge the department and to layoff three employees (two PCS employees and one payout employee) to present to Respondent's Board of Directors. O'Connell presented the memo to the Board of Directors at a meeting held the evening of May 24. The Board of Directors approved the plan as set forth in the memorandum without discussion.

Between May 24 and June 28, Guajardo discussed with the Union Respondent's need to cut \$130,000 from its administrative budget. However, it was not until June 28, that Guajardo informed Sanchez that Respondent "was thinking about" merging the PCS and payout departments and considering employees Urzua, Palafox and Angie Amador for layoff "based upon their qualifications." Amador was the least senior employee in Respondent's payout department. General Counsel does not challenge the selection of Amador for layoff. Sanchez complained that Respondent was considering laying off senior employees Urzua and Palafox. Guajardo responded that Respondent did not have to follow seniority. Guajardo stated that the bargaining agreement permitted Respondent to layoff based on qualifications and that Respondent "was going by qualifications." The layoff provision of the contract states:

When layoffs or reduction of work are necessary, quality and continuity of childcare will be the primary consideration. Among employees who are equally qualified, seniority, as in the length of continuous service with [Respondent] will be the determining factor. . . . Prior to layoff, [Respondent] will give a five (5) calendar days notice to employees.

On June 29, Palafox and Segobia met with Guajardo to discuss reports that Urzua and Palafox were going to be laid off. Palafox questioned why senior employees such as Urzua and

<sup>&</sup>lt;sup>10</sup> Guajardo testified, in his direct testimony, that at the time he spoke with Diaz and Alderete he was just seeking information to see if the merger was a good business move and was not yet seriously considering merging the two departments. However, on cross-examination Guajardo testified that he told Diaz that one payout department employee was to be laid off and that employee would be Angie Amador, the least senior employee. Guajardo also testified that he and O'Connell did not consider any payout employee for layoff until after they had decided to retain Segobia. Thus, it appears Guajardo and O'Connell had already decided to retain Segobia and layoff Urzua and Palafox prior to Guajardo's meeting with Diaz and Alderete.

herself were going to be laid off. Guajardo stated that Respondent was going by qualifications. Palafox stated that Urzua was the most qualified and most senior employee. Guajardo answered that Segobia had worked in the payout department and, therefore, she was the most qualified of the PCS employees. Palafox responded that Urzua had worked in the administrative unit for over 23 years and had been the only payout employee for many years. Guajardo replied that Segobia's payout experience was more recent and that if the matter went to court, he was confident that Respondent "would win." Palafox and Segobia asked why less senior employees were not being laid off. Guajardo insisted that Respondent could lay off employees based on qualifications. Guajardo stated that no lay offs would be taking place at that time. Guajardo did not indicate that layoffs would take place two days later.

On June 30, Guajardo and O'Connell met with Sanchez and Segobia to discuss the Union's proposal regarding the budget shortfall. The parties only discussed a Union proposal and there was no mention of Respondent's plan to merge the provider contract and payout departments with the resultant layoff of three employees. Neither Guajardo nor O'Connell mentioned that layoffs would be made that very day. As the meeting ended, O'Connell stated that he would consider the Union's proposal and Sanchez stated that he would be willing to negotiate every day, if needed. O'Connell stated that if Sanchez was so willing, he would have been calling O'Connell on the telephone rather than protesting with a bullhorn (an apparent reference to the Union's demonstration of April 15). O'Connell accused Sanchez and the Union of ruining Respondent's reputation.

Following the meeting with the Union, O'Connell instructed Guajardo to go forward with the merger of the provider contract and payout departments and to layoff Urzua, Palafox and Amador. At approximately 5 o'clock that afternoon, Guajardo notified Segobia that Respondent would be laying off Urzua, Palafox and Amador that day. At 5pm, Guajardo met with Amador and provided her with her layoff notice and final checks. Guajardo did not directly notify Urzua and Palafox of their layoffs. Palafox and Urzua learned of their layoffs from Segobia. At approximately, 5:30 pm, Sanchez asked Guajardo why Guajardo had not mentioned the layoffs at their meeting, earlier that afternoon. Guajardo answered that Respondent was moving ahead with its plan to cut costs and that the Union's proposal was going to take too long. Urzua then demanded an explanation as to why she, the most senior employee, had been selected for layoff. Guajardo responded that staff talked and then he mumbled something about retaliation. Urzua questioned what retaliation had to do with her layoff. Guajardo did not answer Urzua and waved his hand in a dismissive manner. Despite the contract language requiring employees to receive 5-calendar days notice, Palafox and Urzua did not receive such notice. Subsequently, they received paychecks in lieu of notice.

After the layoffs, supervisors Alderete and Diaz performed Urzua and Palafox's duties. In mid-August the payout employees were trained to perform the provider contract services work. Thereafter, each employee in the merged department performed both PCS and payout work. Segobia testified that she immediately began processing provider timesheets and her training on the payout department's NOHO software system lasted roughly 60 to 90 minutes. Segobia testified that Urzua and Palafox could have been trained just as quickly.

# 5. Respondent's defense

Respondent contends that it had broad authority regarding layoffs and the assignment of job duties. Under Respondent's management rights clause it reserved, inter alia, the rights to: determine the size, number location and function of its organizational units; maintain and improve efficiency of its operations, including the right to establish methods of operations; to determine the qualifications and selection for employment and jobs; to evaluate job

performance; to relieve its employees of duties because of lack of work, reduced funding or other legitimate reasons; and to abolish positions because of lack of work, reduced funding or other legitimate reasons.

Respondent further argues that Miner had no authority over the administrative employees and played no part in the decision to merge the provider contract and payout departments or the resultant layoffs of the three employees. However, Miner apparently had the authority to hold a meeting of the administrative unit employees during work time. Further, Respondent never disavowed Miner's statements. Miner testified that O'Connell was well aware of her strong feelings against the Union.

Respondent argues that antiunion sentiment played no part in the decision to layoff the employees or in the selection of which employees to layoff. Respondent contends that Urzua and Palafox were laid off because they were not sufficiently qualified to work in the payout department. Respondent contends that the payout process had changed from a ten point key process to a NoHo software system and that the State had drastically changed the regulations for provider payouts. However, the NoHo software system was not yet fully operative. The payout employees were still calculating provider timesheets with a calculator and then entering the data into the NOHO program. As indicated above, Segobia needed only 60-90 minutes of training on the NoHo system. Finally, Respondent contends that the retention of Union steward Segobia establishes that Respondent was not motivated by antiunion sentiment.

# B. Analysis and Conclusions

# 1. Jean Miner's Meeting With the Administrative Unit

As shown above, Miner passed out the Union flyer stating that the flyer was what the employees were paying the Union for. When Miner attempted to give Palafox a copy of the flyer, Palafox said that she had already seen it. Miner replied "of course you did because you created it." Palafox answered that she had not and that Miner should talk to the Union. Miner then responded," You pay the Union." I find that by such conduct Miner unlawfully interrogated Palaox in violation of Section 8(a)(1) of the Act. "[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer." Westwood Health Care Center, 330 NLRB 335, 342 (2000) citing NLRB v. McCullough Environmental Services, 5 F.2d 923, 929 (5<sup>th</sup> Cir. 1993). That the interrogation was not in the form of a question does not alter the case.

Miner told the employees that she had gone through their personnel files and that the employees were uneducated. Miner said the employees had the best jobs that they ever had and were lucky to have their jobs. Segobia asked Miner if the meeting was related to her work and if she could be excused. Miner told Segobia that she could be excused. As Segobia left the meeting and Urzua and Palafox went with her. As the three employees were leaving, Miner declared, "There go your leaders. Miner was visibly shaken and an employee questioned her about it. Miner answered that she just "needed to hit something. I find that by such conduct, Miner unlawfully threatened employees in violation of Section 8(a)(1) of the Act. Miner's subjective state of mind is no defense.

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# 2. The Lay Offs of Aurora Urzua and Griselda Palafox

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In Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's Wright Line test in NLRB v. Transportation Corp., 462 U.S. 393, 399-403 (1983). To sustain his initial burden, the General Counsel must show: (1) that the employee was engaged in union activity; (2) that the employer was aware of the activity; and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine. Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999) citing FPC Moldings, Inc. v. NLRB, 64 F.3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994). In order to make a prima facie case, General Counsel must show: 1) Urzua and Palafox engaged in union or protected activity; 2) Respondent knew of that activity; 3) Respondent harbored animus against them because of the activity; 4) Respondent discriminated in terms of employment; and 5) the discipline was temporally connected to the protected activity. Goodyear Tire & Rubber Co., 312 NLRB 674 (1993).

I have found that Respondent has established strong economic justification for a merger of the provider contract and payout departments. The record reveals, and the General Counsel concedes, that the merger of these two departments and the resultant layoff of three employees were necessary because of budgetary considerations. As stated earlier the issue is whether the selection of Urzua and Palafox for lay off over less senior employees was motivated by unlawful union considerations.

It is clear that Urzua and Palafox were engaged in union activities and that Respondent was aware such activity. As stated earlier, Urzua and Palafox were engaged in the Union organizing campaign. Palafox was an election observer for the Union. Thereafter, both Urzua and Palafox participated in the collective-bargaining negotiations on behalf of the administrative unit employees. Both employees assisted bargaining unit employees with grievances. More recently, on April 14, Miner delayed the start of her employee in order to wait for Palafox. After Palafox stated that she had already seen the Union flyer, Miner suggested that Palafox had participated in the preparation of the flyer. After Segobia received permission to leave Miner's meeting, Palafox and Urzua left the meeting with Segobia. Miner then referred to these employees as leaders. On April 15, Urzua and Palafox participated in the Union rally in front of Respondent's offices. Palafox was shown criticizing Respondent in the public television show which aired after the rally.

As stated above, Miner, in her 2002 letter, expressed animus against employees who assisted the Union, whom she referred to as "instigators', "malcontents," and "members of the new 'blackguard." I find particularly relevant her reference to "self serving (more highly compensated but disgruntled office workers) who derailed the organization."<sup>11</sup> Urzua was active in the Union, on the Union's negotiating team, and was the highest paid office worker. On April 14, Miner expressed animus against the Union and contended that the Union engaged in hostile, adversarial, belligerent and hateful behavior. As Urzua, Palafox and Segobia left the April 14

<sup>&</sup>lt;sup>11</sup> Urzua testified that Miner did not merely hand her a copy of the letter but rather threw the letter at her.

meeting, Miner stated, "there go your leaders." At the instant hearing, Miner reaffirmed her antiunion sentiments expressed in her 2002 letter and at the April 14 meeting.

I find further evidence of union animus in O'Connell's statement to Sanchez, on the day of the layoffs, that If Sanchez was sincere about negotiations, he should have picked up a telephone rather than picking up a bullhorn. Further, O'Connell charged that the Union had ruined Respondent's reputation. In addition, Guajardo in answering Urzua as to why she, the most senior employee, was laid off, mentioned that "staff talked" and made an unexplained reference to "retaliation."

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Moreover, I find that Urzua was Respondent's senior employee and more familiar with the State's new regulations than any other employee. Further, she had previously worked in the payout department. While procedures in that department had been updated, there was no reason to believe that Urzua could not readily learn the new procedures. I find it significant that Alderete. the supervisor of the three PCS employees was not questioned as to whom Respondent should lay off and whom Respondent should retain. Further, there was no discussion with Diaz, the supervisor of the payout employees, as to which payout employees should be laid off or retained. It strains credibility to believe that in a reduction of force from ten to seven employees. Respondent would not discuss with its supervisors the relative qualifications of the employees. If Respondent was really concerned about qualifications, Guajardo would have discussed with the supervisors the relative merits of each employee. It seems clear that Guajardo had focused on laying off Urzua and Palafox before he discussed with the supervisors Respondent's plan to merge the provider contracts and payout departments. Thus, the inference of unlawful motivation is strengthened by Guajardo's failure to consult with the employees' immediate supervisor Alderete. In appropriate circumstances, the Board has regarded an employer's failure to consult with the immediate supervisor who is the most accurate source of pertinent information as evidence of discriminatory motivation. Lancer Corp., 271 NLRB 1426, 1427-1428 (1984); Williams Services, Inc., 302 NLRB 492 (1991). Here, Alderete admits that she was never asked which employee or employees should be laid off.

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Guajardo started from the premise that the layoffs would come from the provider contract department. I do not believe that Respondent was oblivious to the disparate impact on union supporters and senior employees this strategy would have. Such a starting points insured that leading Union adherents would be laid off. Second, Guajardo realized that Respondent needed to keep at least one employee with experience in the provider contract department. Guajardo admitted that when he evaluated Urzua and Palafox he did not consider their employee performance appraisals, their lack of discipline or their knowledge and skills in the provider contract department. Instead, Guajardo merely compared Urzua and Palafox to Segobia. The sole criteria for finding that Segobia was more qualified that Urzua and Palafox was the recent performance of payout duties. Guajardo did not compare Urzua and Palafox to the less senior employees in the payout department. Rather, Respondent appears to have narrowly defined qualifications to mean experience in the payout department. 12 Guajardo's approach would necessarily result in the layoff of Urzua and Palafox, two leading Union adherents. Further, such an approach would demonstrate to employees and the Union that Respondent need not follow seniority in laying off employees. Respondent was well aware that these employees were not engaged in childcare, the primary consideration in layoffs. And Respondent was well aware that as to employees who are equally qualified, seniority is the determining factor. Respondent sought

<sup>&</sup>lt;sup>12</sup> Such a redefinition would necessarily result in the layoff of at least two leading Union adherents.

to send a message that it could avoid following seniority by asserting that a less senior employee was more qualified.

Respondent argues that its retention of Union steward Segobia negates the notion that Urzua and Palafox were selected because of their Union activities. However, a discriminatory motive otherwise established is not disproved by an employer's proof that it did not weed out all union adherents. *American Petrofina Co.*, 247 NLRB 183, 193 (1980); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). It is not necessary that the antiunion reason for a layoff be the only one leading thereto. I find that antiunion hostility was the substantial or motivating element which prompted the selection of Urzua and Palafox for layoff.

#### Conclusions of Law

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
  - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By threatening employees with reprisals for engaging in union activities, and by unlawfully interrogating employees about their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
  - 4. By laying off Aurora Urzua and Griselda Palafox because of their union activities, Respondent violated Section 8(a)(3) and (1) of the Act.
  - 5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

# The Remedy

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Having found that Respondent engaged in unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. The Respondent having discriminatorily laid off Urzua and Palafox, it must offer them full and immediate reinstatement to the positions they would have held, but for the discrimination against them. Further, Respondent shall be directed to make Urzua and Palafox whole for any and all loss of earnings and other rights, benefits and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); See also, *Florida Steel Corp.*, 231 NLRB 651 (1977) and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent must also be required to expunge any and all references to its unlawful layoff of Urzua and Palafox from its files and notify them in writing that this has been done and that the unlawful discharge will not be the basis for any adverse action against him in the future. Sterling Sugars, Inc., 261 NLRB 472 (1982). Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:<sup>13</sup>

<sup>&</sup>lt;sup>13</sup> All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Continued

# **ORDER**

Respondent, Children's Services International, Inc., its officers agents, successors, and assigns, shall:

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- 1. Cease and desist from:
  - (a) Laying off employees in order to discourage union activities.

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(b) Threatening employees with reprisals for engaging in union activities

(c) Uı

(c) Unlawfully interrogating employees about their union activities.

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(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Within 14 days from the date of this Order, offer reinstatement to Aurora Urzua and Griselda Palafox to the positions they would have held, but for their unlawful layoffs.

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(b) Make whole Aurora Urzua and Griselda Palafox for any and all losses incurred as a result of Respondent's unlawful layoffs, with interest, as provided in the Section of this Decision entitled "The Remedy". (c) Within 14 days from the date of this Order, expunge from its files any and all references to the layoffs of Urzua and Palafox and notify them in writing that this has been done and that Respondent's layoff of them will not be used against them in any future personnel actions.

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(c) Preserve, and within 14 days of a request make available to the Board or its agents for examination and copying, all payroll records, timecards, social security payment records, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

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(d) Within 14 days after service by the Region, post at its Salinas, California, facilities copies of the attached Notice marked "Appendix". 14 Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of

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findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.
 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF

APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

	business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since April 14, 2004.
5	(e) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.
10	Dated: April 19, 2005, San Francisco, California.
15	Jay R. Pollack Administrative Law Judge
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#### **APPENDIX**

#### NOTICE TO EMPLOYEES

# Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union,

Choose representatives to bargain with us on your behalf,

Act together with other employees for your benefit and protection,

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate in the selection of employees for layoff in order to discourage union activities.

WE WILL NOT threaten employees with reprisals in order to discourage union activities.

WE WILL NOT unlawfully interrogate employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Aurora Urzua and Griselda Palafox to the positions they would have held, but for their unlawful layoffs.

WE WILL make whole Aurora Urzua and Griselda Palafox for any and all losses incurred as a result of our unlawful layoff of them, with interest.

WE WILL expunge from our files any and all references to the layoff of Urzua and Palafox and notify them in writing that this has been done and that the fact of these layoffs will not be used against them in any future personnel actions.

		CHILDREN'S SERVICES INTERNATIONAL, INC.		
	_	(Emplo	Employer)	
Dated	Ву			
<del></del>		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.